No. 72-624

IN THE

Supreme Court of the United States

October Term, 1972

UNITED STATES OF AMERICA,
Petitioner,

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION.

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The criminal informations charged Pennsylvania Industrial Chemical Corporation (PICCO) with discharging and depositing refuse matter into the Monongahela River on August 7 and 19, 1970. PICCO had operated its plant on the Monongahela River since 1949 (Petitioner's Appendix, 18a).

PICCO, at the trial, offered to prove that it had been granted a permit by the Commonwealth of Pennsylvania to discharge its industrial wastes into the Monongahela River,

which permit had been granted on June 27, 1956. PICCO further offered to prove that the standards set by the Commonwealth of Pennsylvania had been adopted by the Federal government as applicable to Federal regulations (18 C. F. R., Chapter V, 620.10) and that the contents of the evidence obtained on August 7 and 19, 1970 contained chemicals below the authorized limits of the State standards as adopted by the Federal government. It was, therefore, the contention of PICCO, as a defendant in a criminal jury trial, that it had a right to show as a defense that the alleged violations were not violations at all since the prosecution was attempting to convict PICCO of a crime of not having a permit while at the same time refusing to permit PICCO to show (1) that its industrial waste discharges were within the water quality control standards of the State and Federal government and (2) that the Federal government itself had not instituted a permit program under the Act of 1899, which was the Act under which PICCO was being prosecuted.

Petitioner states that no effort was made by PICCO to obtain a permit from the Secretary of the Army to discharge effluents into the Monongahela River. The Court of Appeals for the Third Circuit properly found that PICCO was not required to do a useless act, to-wit, apply for a non-existent permit from a non-existent permit program.

The fact that there was no permit program set up by the Corps of Engineers or the Secretary of the Army under the Act of 1899 seems to be known to everyone but the Department of Justice. The first Federal implementation of a permit program is found in the Presidential Proclamation issued December 23, 1970, 35 F. R. 19627. Section 1 of the Presidential Proclamation states, for the first time since 1899, that:

> "The executive branch of the Federal Government shall implement a permit program under the aforesaid section 13 of the Act of March 3, 1899 (hereinafter referred to as 'the Act') to regulate the discharge of pollutants and other refuse matter into the navigable waters of the United States or their tributaries and the placing of such matter upon their banks."

The Council on Environmental Quality is directed to coordinate the regulations and procedures relative to the permit program, and the "Administrator" when used throughout the Presidential Proclamation means the Administrator of the Environmental Protection Agency.

On April 7, 1971, Federal Register, Vol. 36, No. 90, pages 6564, *et seq.*, the first rules and regulations ever issued by the Corps of Engineers, Department of the Army, were promulgated implementing the Presidential Proclamation and establishing administrative procedure for permits for discharges or deposits into navigable waters. On May 4, 1971 Mr. William D. Ruckleshaus, Administrator of the Environmental Protection Agency, promulgated regulations relating to the state certification of activities requiring a Federal license or permit, F. R., Vol. 36, No. 90, page 8563. The certifying agency under these regulations is the State agency of the Commonwealth of Pennsylvania which issued the State permit to PICCO and, as already stated, the certification and standards of the Pennsylvania agency had already been accepted by the Federal government.

Finally, Mr. Ruckleshaus, in an interview reported in Volume 5, Number 5, May, 1971, of Environmental Science & Technology, page 392, stated:

> "It really isn't entirely fair to say that the reason a person is being sued under the Refuse Act is because they don't have a permit. *They couldn't get one if they*

wanted to. Until the permit program of the Corps of Engineers was announced late last year, we didn't have any permit program for the discharge of waste into a stream." (Emphasis added)

The regulations of the Corps of Engineers, Department of the Army for 1939 and 1968 were offered in evidence but refused by the court below to show that the Corps of Engineers through 1970 discussed permits in connection with navigable waters only as permits "for work in navigable waters" or "applications for authority to execute work or erect structures in the navigable waters of the United States". It was not until 1971 that the Department of the Army, Corps of Engineers, issued a circular for "permits for work and structures in and for discharges or deposits into navigable waters". Furthermore, the Army, in the circulars referred to, through its circular of 1968, which was not supplanted until 1971, continued to refer to the requirement of permits for discharges in navigable waters which interfere with navigation and the responsibility of the Army to attempt to have industry share in the cost of the removal of such solids which would interfere with navigation. No mention is made of stopping industrial waste discharges which do *not* interfere with navigation.

The Court of Appeals for the Third Circuit also had before it the following facts set forth in PICCO's brief on appeal to that Court: In 1890, the population of the United States was 62,947,714;[1] the rural population of the United States was 40,481,499, or 65% of the total, while the urban population was 22,106,265, or 35% of the total.[1] The manufacturing work force in the United States was 4,850,000. The total payroll of those engaged in manufacturing pro-

[1] 1960 Census of the Population; United States Summary, Table 3 (pp. 1-4).

cesses was $2,258,700,000.[2] The gross annual product for the years 1893 through 1899 was $13.5 billion in current prices.[3] The population of Allegheny County was 775,058.[4] These were the conditions prevailing in 1899 when Congress passed the Refuse Act.

In 1970 the population of the United States was 203,184,772. The rural population of the United States was 53,884,804, or 27% of the total, while the urban population was 149,280,769, or 73% of the total.[5] The manufacturing work force of the United States was 18,492,000 (1967 Census); the total payroll of those engaged in manufacturing processes was $123,380,600,000.00.[2] Manufacturing plants employed 26% of the entire civilan work force. The gross national product exceeded $1 trillion. The population of Allegheny County was 1,605,016, of which 94.8% resided in urban areas.[5]

The Court of Appeals, recognizing the dissimilarity between the United States in 1899 and 1970, found that for PICCO to be guilty of a crime it would have been necessary to find that Congress intended to create a crime which industry could not avoid if it operated a plant on a navigable stream and discharged any waste into the stream. The cases of *U. S. v. Standard Oil Co.*, 384 U. S. 224, 86 S. Ct. 1427 (1966); *U. S. v. Republic Steel*, 362 U. S. 482, 80 S. Ct. 884, 1960); and *U. S. v. Standard Oil Co. of Puerto Rico*, 375 F. 2d 621 (C. A. 3, 1967), are not precedent for the proceeding attempted against PICCO. *Republic Steel*

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[2] 1967 Census of Manufacturers, Volume I, General Summary, Table 1 (p. 26).

[3] Historical Statistics of the United States—Colonial Times to 1957, U. S. Bureau of the Census (1960) (p. 139), Series F 1-5.

[4] 1969 Pennsylvania Statistical Abstract.

[5] 1970 Census of the Population; Advance Reports.

clearly involved discharges impeding navigation. The two *Standard Oil* cases had nothing to do with a permit program because of the accidental nature of the discharges involved. Until the Presidential Proclamation of December 23, 1970, no permit program existed in the United States for industries existing along the banks of navigable waters and discharging industrial wastes into navigable streams. Throughout World War II, the United States government gave "E" awards for excellence to industries along every navigable water way in the country who were discharging industrial wastes into such waterways while creating the war arsenal to win the war. The literal interpretation of the Act of 1899 demanded by the government in 1970 would have required every industrial establishment in the United States discharging industrial wastes into a navigable stream to close its plant since no permit program existed. The Court of Appeals, recognizing the impracticality of such a finding, has read the Act of 1899 in harmony with the Water Quality Act of 1965 and 1970 to achieve an orderly transition and enable industry to come into compliance with the permit program as established. As stated by the Court of Appeals for the Third Circuit, to hold otherwise would deprive PICCO of its property without due process of law.

Until Congress acts to provide reasonable regulations and statutory authority which avoid illogical, unconstitutional results,[6] the Court of Appeals for the Third Circuit

[6] The 92nd Congress has finally passed, over Presidential veto, an act which may clear up many of the prior legislative inconsistencies

has properly interpreted the areas in which Congress has acted to avoid these results and certiorari should be denied.

Respectfully submitted,

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